IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1069 OF 2005

WITH

CIVIL APPLICATION NO.1210 OF 2005

Dr.Firoze Dara Mirza & Anr. ..Appellants.

Vs.

Madan Singh Barara & anr. ..Respondents.

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Mr.Aspi Chinoy, Senior Advocate i/b R.M.G. Law & Associates for the Appellants.

Mr.Navin Parekh with Mr.Lalit Jain i/b Meghraj & Co. for the Respondents.

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CORAM : DR.D.Y.CHANDRACHUD, J.

29th November 2005.

P.C. :

1. Admit. Counsel appearing for the Respondents waives service. By consent taken up for hearing and final disposal.

2. This Appeal from Order is directed against an order passed by the City Civil Court on 26th August, 2005 on a Motion taken out by the Appellants. The City Civil Court declined to grant interim relief "unless the boundaries are measured by the respective parties in view of the Maharashtra Land Revenue Code".

3. The Appellants and the Respondents are adjoining property owners. The Appellants are owners of a property under a registered deed of conveyance dated 26th April, 1973. The holding of the Appellants under the aforesaid deed of conveyance is 2500 sq.yds., equivalent to 2090 sq.mtrs. together with a cottage situated thereon at Marve in Village Aksha of Taluka Borivli bearing Survey No.1 Hissa No.3 (Part) and Plot No.2B bearing new Survey No.1(C) and Hissa No.1A/2A. The Respondents acquired the adjoining property twenty two years after the Appellants by a registered deed of conveyance dated 26th June, 1995. The holding of the Respondents bears Survey No.1C, H.No.1/1A C.T.S.11/A.

4. According to the Appellants, these

properties form a part of a larger plot admeasuring 10,006 sq.yds. which was owned by Rehmatbanoo Mohamedali Merchant and Hasanali Jetha. The land was stated to have been partitioned into two plots, Plot No.1 admeasuring 5006 sq.yds. belonging to Hasanali Jetha and Plot No.2 admeasuring 5000 sq.yds. belonging to Rehmatbanoo. Rehmatbanoo sold an area admeasuring 2500 sq.yds. out of her holdings to one Dr.Gariba and the balance to the Appellants in 1973. According to the Appellants they have been in possession and occupation for a period of 30 years. Property taxes have been paid to the Municipal Corporation and the property has been assessed by the Corporation. The Appellants contend before the Trial Court that on 1st October, 2004, the First Respondent wrongfully demolished a part of the northern boundary wall of the Appellants. The matter was reported to the police. However, on 17th October, 2004, the First Respondent once again broke the residual portion of the aforesaid wall upon which a complaint was lodged at the Malavani Police Station. The suit instituted by the Appellants seeks to restrain the Respondents from encroaching upon their property. At the ad interim stage, a Court Commissioner came

to be appointed and part of his report will have a material bearing on the subject matter of the present proceedings. An ad interim order was passed by the Learned Trial Judge on 28th October, 2004 granting an injunction in terms of prayer clause (a) of the Notice of Motion and directing the parties not to disturb the situation of the boundary wall as reported in the report of the Court Commissioner.

5. On behalf of the Respondents, reliance was sought to be placed on an order of the Sub-Divisional Officer dated 29th April, 1986 demarcating the respective holdings. The Appellants sought a fresh survey which was carried out, on or about 6th January, 2005 and a map has been prepared demarcating the holdings. There is an order dated 28th February, 2005 of the Superintendent of Land Records. The First Respondent has challenged that order in appeal.

6. While dismissing the Notice of Motion, the Learned Trial Judge was of the view that no relief could be granted to the Appellants unless measurements have been completed by the authorities

under the Land Revenue Code. On behalf of the Appellants it has been submitted that the order of the Learned Trial Judge fails to take into consideration the material on record which will show that for a period of 30 years the Appellants have been in possession and use of property which they had purchased in pursuance of a registered deed of conveyance dated 26th April, 1973. The report of the Commissioner, it was urged, and the assessment record of the Municipal Corporation support the case of the Appellants. On the other hand, on behalf of the Respondents it was submitted that the Respondents are willing to make a concession that the ad interim order that had obtained during the pendency of the Motion before the City Civil Court may be continued until a measurement is carried out. However, it was urged before the Court by the Appellants that there is a serious breach of peace on the part of the Respondents upon the forcible demolition of the boundary wall which has been adverted to in paragraph 13 of the affidavit filed before the Trial Court.

7. In assessing the merits of the rival

contentions at the interlocutory stage, it would be necessary to advert to the report of the Commissioner who was appointed by the Learned Trial Judge. Both the parties were present when the Commissioner carried out his inspection. The Commissioner found the existence of a broken wall approximately 186 ft. in length with a height of between one foot to one and a half feet. "Rock material" was scattered near the length of the entire wall. The report of the Commissioner shows that the cottage belonging to the Appellants is situated at a distance of 6 ft. within the boundary of the wall and it was the Appellants who were in possession of the cottage. A portion of the dividing line between the property of the Appellants and the Respondents is covered by trees while the rest, as noted, consists of a now broken compound wall. Prima facie, the report of the Commissioner does establish the existence of a boundary wall covering a length of 186 ft. and the existence of scattered rocks and dry material would lend support to the grievance of the Appellants that an attempt had been made to demolish the wall. The proximity of the cottage of the Appellants to the boundary wall is again a circumstance that

merits emphasis.

8. When the Motion came up for ad interim orders before the Learned Trial Judge, the Court recorded an answer to a query which was posed to counsel appearing for the Respondents in the following terms :

> "To a pointed question to Mr.Parekh as to whose cottage was there in the portion claimed by the Defendants, the answer is that it is of the Plaintiffs and therefore in those circumstances, the aspect that the property should be demarcated will have to wait."

This is of some significance because at that stage it was the case of the Respondents that the cottage, in the portion which is claimed by the Respondents, belongs to the Appellants. However, it would appear that subsequently when an affidavit in reply was filed before the Learned Trial Judge the Respondents sought to assert the claim in paragraph 8 of the affidavit dated 12th April, 2005 that the structure bearing No.11/1 is owned by the

Respondents and the Respondents are paying assessment to the Municipal Corporation. Apart from being contrary to the statement which was solemnly made before the Learned Trial Judge, at the ad interim stage by counsel upon instructions, this is belied prima facie by the assessment record. The assessment bills show that for a period of 30 years, both the vacant land and the cottage have been assessed in the name of the Appellants. The grievance of the Appellants is that though this position obtained between 1973 and 2004, the Respondents secured bills from the Municipal Corporation for the period 2003-04 in the name of the Appellants at the address of the Respondents. Hence, though the assessment is shown to be in the name of the Appellants, the bills were forwarded by the Corporation to the address of the Respondents.

9. The material on the record is prima facie sufficient to indicate the existence of a wall dividing the properties of the Appellants and the Respondents. The claim which has been set up by the Respondents is that though their holding in the 7/12 extracts is reflected as 5006 sq.yds. the

actual holding is about 6340 sq. mtrs as a result of which a substantial part of the property of the Appellants including the cottage falls to the ownership of the Respondents. No observations of the Court are warranted in respect of the aforesaid claim since it is open to the Respondents to pursue such remedies as are open in law to assert a title which they now seek to establish. At this stage, the Court must have regard to the established position as it obtained for thirty years with regard to possession. The claim of the Appellants and their possession is founded on a registered deed of conveyance of 26th April, 1973. The Respondents entered upon the scene two decades later under a registered deed of 26th June, 1995. There is, in my view, a considerable degree of merit in the submission which has been urged on behalf of the Appellants that the parties should maintain the status quo in terms of the report of the Court Commissioner and that the Appellants should be allowed to restore the wall as it obtained until it was broken or demolished. However, having regard to the circumstance that the appeal filed by the Respondents against the order of the Superintendent of Land Records is still

pending, the Court will, at this stage, issue appropriate directions permitting the Appellants to put up a barbed wire fencing on the Appellants' side of the existing wall subject to their undertaking that they shall remove the said fencing if so directed by the Learned Trial Judge upon the report of the Appellate Authority, on an application being made in that regard. The Court cannot inculcate values of good neighbourly behaviour among parties but when conflicts between neighbours lead to a serious apprehension of a breach of peace, the Court has to step in. In para 13 of their affidavit the Appellants have averred thus :

> "...the defendants are causing me constant nuisance (in the nature of dumping garbage, letting in their dogs and servants into the suit property and as such making a lot of noise when renting out his property for film shooting, which goes on till late in the night), on account of the boundary wall not being there. The same is evident from the photographs recently taken by the Plaintiffs which I crave leave to refer to

and rely upon, when produced. I say that the plaintiffs are ready and willing to give any undertaking which the court may require from them, if they are allowed to reconstruct the boundary wall during the pendency of the suit."

10. In the circumstances this Appeal is disposed of in terms of the following directions :

1) The impugned order of the Learned Trial Judge dated 26th August, 2005 dismissing the Notice of Motion is quashed and set aside. The ad interim order dated 28th October, 2004 shall stand confirmed as an order in the Motion;

2) The Appellants are permitted to put up a barbed wire fencing immediately adjacent to the existing wall as depicted in the report of the Court Commissioner on their side of the property facing the cottage of the Appellants, subject to the Appellants filing an undertaking before the Trial Court within a period of one week from today, that the

Appellants shall do so at their risk and cost and remove the barbed wire fencing, in the event that they are called upon to do so by the Trial Court;

3) It would be open to the Respondents to apply before the Learned Trial Judge for further directions after the Appellate Authority under the Land Revenue Code decides the appeal against the order of the Superintendent of Land Records. All the rights and contentions of the parties in that regard are kept open.

The Appeal is accordingly disposed of. There shall be no order as to costs.

Stay refused.

In view of the disposal of the Appeal from Order, the Civil Application is rendered infructuous and is accordingly disposed of.